

# The Color Fault Lines: Asian American Justice from 2000\*

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## INTRODUCTION

This symposium aims to connect those of us here – scholars, lawyers, community workers and law students. It also aims to link “us” with our Asian American communities, and then beyond, with African Americans, Native Americans and Hawaiians, Latinas/os and white Americans of good will, and then beyond that, with all people struggling against forms of social discrimination. In doing so, the symposium specifically aims to further a joint project of envisioning Asian American participation in justice struggles from the Year 2000 on.

Let’s turn to history – to my spring semester, second year at Boalt Hall, when I took a two-credit externship at Dale Minami’s new law office in Oakland (Dale had just left the Asian Law Caucus). Late every Thursday, Dale would sit and talk about political lawyering – about the importance of not only knowing the mechanics of in-the-trenches lawyering practice, but also of having a sophisticated theoretical grasp of how law and the courts really operate in a largely white-dominated (but demographically changing), capitalist society. He was skeptical and hopeful, harsh and uplifting – and always critically strategic. He would tell me, “start now, do; but also always read and think.”

So I did – small legal things in the Asian American community and with APALSA. I studied Marxist Theory of the State and Law and Ancient Law, and I read Legal Realism, Legal Process, Asian American History, John Rawls and “Law Against the People.” (I would have taken critical race theory and social justice courses with Professors Harris and Wildman if they had existed.) When I started a complex litigation practice and did community law work, I found the critical take on law and legal process immensely useful. Seeing the system from the outside helped me function on the inside.

Several years later, this all came even more vividly to life when Dale and others asked me to join the Fred Korematsu coram nobis legal team to reopen the infamous WWII Japanese American internment case *Korematsu*

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v. U.S.<sup>1</sup> Former Supreme Court Justice Goldberg advised the legal team to "forget it, you haven't a chance." The legal team understood, through its rigorous critique of race, politics and law, that the chances of overturning the Supreme Court's finding that military necessity justified the internment were slim-to-none (despite the recently discovered mountain of suppressed evidence showing government prosecutorial misconduct). Its chances were indeed slim-to-none if the lawyers relied narrowly on established legal doctrine and procedure.

The legal team also understood, however, that the original *Korematsu* case, despite its lofty doctrinal niche in constitutional law books, was a political case. Reopening it meant simultaneously jumping through all the formal technical legal hoops and conceiving the litigation politically – merging our use of the system with our criticism of the system's normally tilted operation.

This meant grasping the dialectic of race and rights and defining our goals in larger political terms. Reopening the case, however futile at first, enabled lawyers, organizers and students to educate others about the issues. Mainstream newscasters and journalists took interest; we spoke on radio and television, in classrooms, churches, homes, businesses. Education built litigation support and helped regitalize a stalled Redress movement. Win or lose, expansive public litigation of the case served this larger strategic political aim. It also reciprocally infused the litigation with energy, money, and technical and spiritual support. Dozens of people, including many former internees, still suffering and previously silent about their incarceration, gave time and effort, making phone calls, stuffing envelopes, chasing down documents, spreading the word to other internees and the public. These efforts in turn reshaped the context of the case: from historical artifact to living injustice; from a focus on Japanese American loyalty to a focus on government responsibility for the imprisonment of 120,000 innocent Americans; from alleged Asian American guilt to a manifest failure of the legal process itself. The formal legal claims were due process and equal protection. But insights into the dialectic of race and civil rights were key to the ultimate political value of bringing the case.<sup>2</sup>

So what does this all mean today, particularly for you students working to graduate, get a job, pay off loans, gain some experience *and* do justice? What does that mean for the roles of young (and older) lawyers, for scholar-teachers, for activists-organizers? Can we blur the lines between these sometimes seemingly separate either-or roles? *Must we* blur the lines to do justice at 2000? If so, how do we do this?

I'll respond first with some comments about the "how to," or process, and then about the "what," or substance.

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1. 323 U.S. 214 (1944).

2. See Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341 (1990) (describing the *Korematsu* legal team's assessment of race and rights in the federal courts).

## I. SCHOLARS, LAWYERS, ACTIVISTS AND STUDENTS

Twenty years of steady attacks on civil rights by conservative think tanks, lawyers, and politicians have undermined legal justice for communities of color.<sup>3</sup> Progressive lawyers and activists struggle within a shrinking, if not partially reactionary, civil rights paradigm – consider Prop. 209, the “Civil Rights” initiative,<sup>4</sup> and the “civil rights” settlement paid by a largely African American organization to the white teacher in Piscataway.<sup>5</sup> With this backdrop, progressive race scholars have developed powerful critiques of not only conservative race theory and politics but also the limitations of the traditional liberal approach to civil rights law and practice.

But as a long time civil rights attorney and teacher said not long ago, “The progressive race theory I’ve read recently is intriguing but not particularly helpful. It doesn’t help us.”<sup>6</sup> By “us” he meant the civil rights advocates and lawyers on the frontline dealing with backlash in the courts, legislatures, city halls and businesses. By “us” he also meant those progressives seeking concepts, language and methods – practical theory – for combatting neoconservative think tanks fueling political and legal movements against affirmative action, immigration, welfare, gay rights and multiculturalism. A Latina law professor recently urged law teachers to be more savvy – “to expand our power base” outside the academy.<sup>7</sup> “We can’t stay in the niche of law schools,” she said.<sup>8</sup> We need to organize better. “A key piece of our work should be *strategic knowledge*.”<sup>9</sup> By that she meant we need to translate our work not only for activists and policymakers but also for the mainstream American public.<sup>10</sup>

At the same time, observers noted that some, perhaps many, frontline lawyers-activists, who are pressed for time, out-resourced, and under siege, do the best they can litigating within an increasingly constricted rights system, while resisting conservative backlash. They fail, however, to undertake sustained critical inquiry of race, rights and legal process in order to, in their own words, “challenge [politically] the influence of legal ideologies and [established institutional practices] that limit our capacity to imagine and implement [effective structural] solutions to society’s ills.”<sup>11</sup>

All of this is over-generalized. Reality is much more complex. Yet, the overall distance between progressive race scholars and civil rights practitioners has been described as a “gap of chasmic proportions” (in

3. See RICHARD DELGADO AND JEAN STEPHANIC, NO MERCY (1996) (describing the far-reaching political and legal impact of well-funded conservative think tanks).

4. See CAL. CONST. art. I, § 31.

5. See David G. Savage, *Civil Rights Leaders Pay to Settle Key Bias Case Law*, L.A. TIMES, Nov. 22, 1977, at A1.

6. See Eric K. Yamamoto, *The Politics of Theory in Action and Policy*, 53 MIAMI L. REV. 683 (1999) (quoting Dale Minami).

7. *Id.* (quoting Selina Rominy).

8. *Id.*

9. *Id.*

10. *Id.*

11. See Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 835 (1998).

contrast with the close connection between conservative scholars and politicians). But I see the gap closing. This forum contributes. Much more remains, though – for scholars to get their hands dirty in the trenches, to inform their research and theorizing, and to then translate insights into practical forms, into “strategic knowledge” – as Sumi Cho does, and as conservative think tanks have done. And for frontliners, amidst the fray, to engage scholars and critical theory work, like Dale Minami and Victor Hwang of the Asian Law Caucus do, not only to help litigate immediate cases, but also to build new concepts, language and strategies, and not only to coalesce among ourselves, but also to challenge mainstream America (where most judges, policymakers and bureaucrats reside) into re-imagining social justice. In effect – to re-claim civil rights at 2000. You, as law students, have a special role to play in leaping the gap of chasmic proportions: by excelling in critical thinking classes, in creating and speaking at forums like this, in writing op-ed pieces and letters to the editor and articles for the *Asian Law Journal*, as well as legal briefs, in doing internships and clerkships in the trenches, in doing community work, in participating in demonstrations and by insisting that all sides bridge the chasm.

By now you are probably thinking, we understand the process point – the palpable need for coalescence – but what about substance? Around what real life substantive justice concerns are we to coalesce critically and pragmatically? There are many possibilities, including rethinking how races (and racial meanings) are constructed, retooling how antidiscrimination law comprehends institutional racism, and reframing, through cognitive psychology, how and why people discriminate (with the implications for equal protection and Title VII). (Michael Omi’s presentation addresses some of these important points).<sup>12</sup> I will distill just one subset of substantive concerns – or fault lines – particularly relevant to Asian American justice at 2000.

## II. JUSTICE FAULT LINES

A hundred years ago African American scholar-activist W.E.B. Dubois famously observed that the social issue for the 20<sup>th</sup> century would be the “color line” dividing whites and blacks. He was right. The color line remains important, but in expanded ways.<sup>13</sup> The July 1999 issue of the *UCLA Amerasia Journal* is titled “Crossing the Color Line.”<sup>14</sup> While acknowledging the fundamental significance of African Americans to race in America, it emphasized that now the U.S. color line encompasses whites and all communities of color. Indeed, traversing the white/color divide is a daily challenge.

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12. See generally MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* (2d ed. 1994).

13. See generally Chris Iijima, *The Era of We-Construction: Reclaiming the Politics of Asian American Identity and Reflections on the Critique of the Black/White Paradigm*, 29 COLUM. HUM. RTS. L. REV. 47 (1997).

14. See CROSSING THE COLOR LINE, 25 AMERASIA J. (Russell Leong ed., July 1999).

For Asian Americans concerned about justice in the streets, schools, workplaces and in our hearts, I suggest something even more layered. Crossing the justice color line actually entails crossing, indeed leaping, four color lines in addition to white on black and even white on color – what we can call justice fault lines.

I use the term “fault lines,” borrowing from Tomas Almaguer,<sup>15</sup> because while the lines (which I’ll elaborate on) are deep, powerful and fear-generating, they are often subsurface and the objects of daily denial. They are not simple cracks; rather they are potentially huge rifts that threaten progress. I use “leaping” because it expresses both the vigorous action needed to traverse the faults and a certain underlying faith in the human spirit’s capacity for doing so. (I use “leaping” instead of “crossing,” which is passive, or “bridging” which implies a physical structure not in need of constant care).

#### *A. Color on Color*

The first justice fault line facing Asian Americans is color on color – or, more particularly, the gulf of misunderstandings about complex color on color tensions. While we often talk of expanding “black/white,” we generally mean to recast the color line as white versus color – and certainly the Denny’s discrimination suits and recent white shootings of Asian Americans and African Americans underscore the relevance of both white/black and white/Asian American. What we often overlook in thinking about justice, though, is that the color line also needs to be carefully redrawn sometimes to configure color on color.<sup>16</sup> I am speaking here of Asian American agency, of the way Asian Americans, ourselves at times the targets of violence and discrimination, sometimes uncritically wield limited but significant power through law to harm other racial communities.

Look no further than across the bay at the public school controversy in San Francisco. Chinese Americans plaintiffs claimed that they were deprived of equal protection because a consent decree achieved by the NAACP in an earlier discrimination suit (which at first benefited Chinese Americans) set a 40 percent admissions cap on any one racial group.<sup>17</sup> Because of the cap Chinese American plaintiffs had to score higher than any other group members to matriculate at desired “magnet” schools. The plaintiffs, while voicing understandable frustration, framed the public rhetoric of their civil rights claim in terms of “less qualified” African Americans and Latinos gaining school admissions at the expense of “superior” but “capped” Chinese American students. This denigrating rhetoric was cast without acknowledging the enduring history of discrimination against African Americans. It also failed to recognize the

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15. See TOMAS ALMAGUER, *RACIAL FAULT LINES* (1995).

16. See generally ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST CIVIL RIGHTS AMERICA* (1999).

17. See *Ho v. San Francisco Unified School District*, 965 F. Supp. 1316 (N.D. Cal. 1997); 147 F.3d 854 (9th Cir. 1998).

irony of Asian Americans charging blacks with civil rights violations for African American civil rights efforts to secure racial equality (which also helped Asian Americans). Asian American groups split badly on the case, which ultimately pitted some Chinese Americans and whites against African Americans, Latinas/os and other Asian Americans.

Think also about the housing controversy at Bay View and Hunters Point in San Francisco. Vietnamese immigrant families who were placed there to integrate public housing suffered horrible racially-based violence and daily intimidation. The Asian Law Caucus' important legal intervention revealed the suffering of those families and compelled the city and federal government to take affirmative steps to prevent future violence. The attorneys and principals also wrestled with the complex interplay of African American residents (claiming the housing as "theirs") and Asian Americans (claiming "their civil rights"). Yet the deeper interracial issues – the broader pre-existing Asian American and African American intergroup tensions – appeared to receive little sustained, thoughtful public airing or understanding. The simplistic storyline of the controversy, repeated by the media and many others, was: Asian American victims, African American perpetrators and a neglectful housing authority. For this reason, African Americans, including the mayor, lined up to "defend" the African Americans residents and their "right" to public housing. Lost in the public rhetoric was a thoughtful account of racial history and larger intergroup dynamics in terms of power, identity and struggles against white discrimination. All of this bolstered the storyline's mainstream subtext: special privileges for racial groups that still cannot get along.

How should we critically analyze and act upon color on color conflicts in housing, education, and public contracting, even in the larger context of partial white control? How do we interrogate history, power and privilege, heal deep intergroup wounds and forge productive interracial alliances? What is the efficacy of civil rights rhetoric and litigation in these settings? The point of leaping this color fault line is not to blame but to more fully understand, and act upon, color on color dynamics.

### *B. Asian American Color on Color*

As we expand white on black, a second fault line is Asian American ethnic group on ethnic group – that is, intra-Asian American color on color. We need to define in our own terms our intra-group injuries and our responsibilities for addressing them. A Filipina educator in Hawai'i recently told me, "I came to the U.S. prepared to leave my hatred of Japanese behind, because the Japanese Americans here had nothing to do with our treatment during the War in the Philippines. But here it's the Japanese Americans, and sometimes the Chinese and Korean Americans too, who look down at us and keep us out of government jobs. It makes me furious."<sup>18</sup> What do we think? How do we respond?

How do we react to the national story of the distraught immigrant

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18. Conversation with anonymous educator, Oct. 1998 (notes on file with author).

Hmong mother who strangles her children to relieve her, and their, misery and then fails at suicide – do we embrace (“this is our struggle too”), recoil (“she’s a terrible person”) or distance (“it’s not really about me”)? What if her attorneys publicize a culture defense – to what extent are all Asian Americans impacted? The challenge is posed: How do we bridge our internal Asian American fault lines so that Asian American justice is not only about “out there” but also “in here”?

### C. Color Centrism

A third justice fault line is color centrism. Because race is such a predominant organizing factor in daily life and in our analyses of problems, many of us tend to underplay intersecting influences. For instance, think of the Hmong mother’s legal and social situation. How do we respond to the intricate confluence of race (Asian), gender (female), culture (Hmong American), citizenship (foreign) and class (poor) operating for her? Or unravel the local police reaction to the fourteen year-old Laotian boy running naked and bleeding down the street – returning him to serial torturer-murderer Jeffrey Dahmer because it looked like a white-Asian gay lovers spat?<sup>19</sup> And think about the garment workers actually enslaved in barbed wire sweatshops in L.A. – imprisoned, exploited and abused. I did not mention gender or citizenship status, but you knew the workers were Asian (Thai), immigrant, women. But you probably did not know that they later formed a tense yet fruitful alliance with Latina garment workers.<sup>20</sup>

How are we to teach/learn/act on these complex intersections amid legal controversies – traversing the color centrism fault line to do justice that people experience fully?

### D. Citizenship/Foreignness: Who Belongs?

Finally, each of the color fault lines just described is cross-cut by a fourth and deeper fault: the divide as to “Who Belongs?” That divide is reflected legally in the idea of citizenship. Citizens belong; foreigners do not. But who should be a citizen? And who does the law and its bureaucracy recommend? These were questions at this country’s inception (blacks excluded), during the last half of the 19<sup>th</sup> century (Chinese Exclusion Act), during the 1920s (the “white” naturalization cases) and during the 1990s Republican Contract with America (its platform of nonwhite immigrant exclusion).<sup>21</sup> They are now questions that implicate transnational capital, labor and human rights. They also raise the question of Native American (and Hawaiian) sovereignty – who wants to belong, who deserves independence?<sup>22</sup>

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19. See Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L. J. 1257 (1998).

20. See Julie Su, *Making the Invisible Visible: The Garment Industry’s Dirty Laundry*, 1 J. GENDER, RACE & JUST. 405 (1998).

21. See Natsu T. Saito, *Model Minority, Yellow Peril: Functions of “Foreignness” in the Construction of Asian American Legal Identity*, 4 ASIAN L. J. 71 (1997).

22. See generally READINGS IN AMERICAN INDIAN LAW (Jo Carrillo ed., 1998).

The variegated racial votes on Prop. 187 (the anti-immigrant initiative) and the splits over welfare "reform" reveal that not only conservative whites, but Asian American and other groups, are ambivalent about who belongs and what the law should do about it.

#### CLOSING

In sum, at 2000, we know that our active participation in the civil rights wave, generated by African Americans, has made most of our lives better. We also know that poverty, discrimination and violence persist for all racial communities, and we know that prickly tensions exist within Asian American groups and with other racial groups. So what are we to say about Asian American justice at 2000?

Let's start by how complicated the "we" is. We at this symposium are ethnically, immigrationally, generationally and culturally mixed. No longer can "Asian American justice" be understood simply as resistance against white discrimination and violence – although that remains an important task. No longer is "Asian American justice" discussible only in terms of Chinese and the Exclusion Act and Japanese and the Internment – although those are significant historical facets. Asian American justice now also includes the differing struggles of Filipinos, Koreans, South Asians, Southeast Asians, Native Hawaiians and more, first through fifth generations, of multiple cultures, classes and sexual orientations.

Asian American justice means simultaneously working on and working beyond "Asian American" injuries and the quest for a mainstream political presence. It additionally entails transforming the very idea of "Asian American justice" (which narrowly implies justice "for" injured Asian Americans) into "justice by Asian Americans" (which means Asian Americans as agents of justice for ourselves and, equally important, for others). That in part means rethinking who we are and what powers and responsibilities we have to ourselves and others – to acknowledge that we are, in situations, both subordinated and subordinating. It means thinking critically about and acting pragmatically upon the dialectic of race and civil rights. Justice by and for Asian Americans for the Year 2000 challenges us in here, and out there, to coalesce in leaping the color fault lines.